Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEALS NO 05-8 OF 2001(W), 05-9 OF 2001(W), 05-10 OF 2001(W), 05-11 OF 2001(W) AND 05-12 OF 2001(W)

MOHAMED DZAIDDIN CHIEF JUSTICE, WAN ADNAN CJ (MALAYA), STEVE SHIM CJ (SABAH & SARAWAK), ABDUL MALEK AHMAD AND SITI NORMA YAAKOB FCJJ

17 OCTOBER 2001

Criminal Procedure *— Judge — Disqualification — Apprehension of bias — Accused detained for organizing demonstrations protesting judge's judgment — 'Real danger of bias' test — Whether facts gave rise to real danger of bias on part of judge*

This was an appeal against the decision of the learned trial judge dismissing the appellant's motion for the writ of habeas corpus (see [2001] 2 MLJ 481). At the commencement of the trial, the appellant had urged the learned judge whether he should recuse himself from hearing the case on the ground that the learned judge was the judge who heard the case involving Dato' Seri Anwar Ibrahim, the conviction and sentence of which was handed down of 14 April 1999, the date that was referred to as 'Black 14' by the respondent. The appellant's application was based on an 'apprehension of bias', that there was a reasonable apprehension of the part of a fair minded person that the learned judge might not bring an impartial mind to decide the case as such justice would be seen to be done.

Held, dismissing the appeal:

(1) The test to be applied in the present case was the 'real danger of bias' test. Hence, the question here was whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the habeas corpus application (see p 325D); *R v Gough* [1993] AC 646 followed.

(2) On the facts, there was no real likelihood of danger, in the sense of a real possibility of bias on the part of the learned judge when he heard the habeas corpus application. The only common factor between the appellant and the 'Black 14' judgment of the learned judge was that the appellant was detained by the respondent for organizing demonstrations one of which was on 14 April 2001 which became the foundation of the 'Black 14' allegation of the respondent. However, such circumstances did not give rise to a real danger on the part of the learned judge (see p 325E–F).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim perbicaraan yang arif menolak usul perayu untuk writ habeas corpus (lihat [2001] 2 MLJ 481). Di permulaan perbicaraan, perayu telah mendesak hakim yang

arif untuk menarik diri daripada mendengar perbicaraan kes tersebut atas alasan bahawa hakim yang arif tersebut adalah hakim yang mendengar kes tersebut yang melibatkan Dato' Seri Anwar Ibrahim, di mana sabitan dan hukuman telah dijatuhkan pada 14 April 1999, tarikh yang dirujuk sebagai 'Black 14' oleh responden. Permohonan perayu adalah berdasarkan satu 'berat sebelah yang dikhuatiri', di mana terdapat satu kekhuatiran yang munasabah di pihak seseorang yang berfikiran waras bahawa hakim yang arif mungkin tidak akan berfikiran saksama semasa memutuskan kes tersebut memandangkan keadilan perlu dilihat untuk dilaksanakan.

Diputuskan, menolak rayuan tersebut:

(1) Ujian yang diterapkan dalam kes sekarang ini adalah ujian 'bahaya sebenar berat sebelah'. Oleh itu, persoalan di sini adalah sama ada berdasarkan fakta-fakta dan keadaan, adakah terdapat bahaya sebenar berat sebelah di pihak hakim perbicaraan yang arif apabila beliau mendengar permohonan habeas corpus tersebut (lihat ms 325D); *R v Gough* [1993] AC 646 diikut.

(2) Berdasarkan fakta-fakta, tiada kebarangkalian bahaya, dalam erti kata kemungkinan sebenar, adanya berat sebelah di pihak hakim yang arif apabila beliau mendengar permohonan habeas corpus tersebut. Satu-satunya faktor yang sama antara perayu dan penghakiman 'Black 14' oleh hakim yang arif adalah bahawa perayu telah ditahan oleh responden kerana mengadakan demonstrasi di mana salah satunya adalah pada 14 April 2001 yang telah menjadi asas dakwaan 'Black 14' oleh responden. Namun begitu, kaedaan begitu tidak menimbulkan bahaya sebenar di pihak hakim yang arif (lihat ms 325E–F).]

Notes

For a case on disqualification of a judge, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 1839.

Cases referred to

Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305 (refd)

Ebner v Official Trustee in Bankruptcy (2000) HCA 63 (refd)

Locabail Ltd v Bayfield Properties [2000] 1 All ER 65 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (refd)

Pinochet, Re (No 2) [1999] 1 All ER 577 (refd)

PP v Dato' Seri Anwar Ibrahim (No 3) [1999] 2 MLJ 1 (refd)

R v Gough [1993] AC 646 (folld)

R v Papadopoulos (No 2) [1979] 1 NZLR 629 (refd)

Webb v The Queen (1994) 68 ALJR 582 (refd)

A *Sulaiman Abdullah* (*Sivarasa Rasiah, Christopher Leong, Malik Imtiaz Sarwar* and *Moganambal Murugappan* with him) (*Daim & Gamany*) for the appellants.

Azahar Mohamed (*Yusof Zainal Abidin, Mary Lim Thiam Suan* and *Tun Abd Majid Tun Hamzah* with him) (Attorney General's Chamber's) for the respondent.

B

Mohamed Dzaiddin Chief Justice (delivering judgment of the court): This is an appeal against the decision of Augustine Paul J given on 25 April 2001 dismissing the appellant's motion for the writ of habeas corpus (see [2001] 2 MLJ 481).

C The appeal is founded on several grounds. However, before us on 15 October 2001, we heard arguments on the first ground, ie the recusal application and adjourned our decision to today.

The facts leading to the above application are these. At the commencement of the hearing before the learned trial judge, Mr Sivarasa, one of the counsel for the appellants, urged him to consider whether he D should recuse himself from hearing this case. Counsel's application was grounded on the fact that the learned judge was the judge who heard the case involving Dato' Seri Anwar bin Ibrahim, the conviction and sentence of which was handed down on 14 April 1999. This is the date that was referred to as 'Black 14' in the press statement of the respondent. Counsel E said that the conviction and sentence was the subject matter of strong public criticism, including the Bar Council. He added that although there was no assertion of actual bias, there might be a perception of bias as the facts are in the public domain. In opposing the application, Dato Abdul Gani Patail, Senior Deputy Public Prosecutor, said that the press statement of the respondent did not refer to the judgment of 14 April.

F In his grounds of judgment (at p 601 appeal record), the learned judge held as follows:

> ... If I were to dismiss the applications pending hearing; would a reasonable person conclude that I am anti reformasi? There was no response to this question from learned counsel. If the answer to the test is in the affirmative it G is appropriate that I recuse myself from hearing the case. Such a perception can be said to be reasonable if, in my judgment of 14 April, I had made unnecessary comments on the reformasi movement. A perusal of the judgment will reveal that there is absolutely no reference whatsoever to the movement in the judgment. In the premises I was satisfied that the application made before me was frivolous, vexatious and an abuse of the process of the H court. Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact it would be a gross dereliction for a judge to disqualify himself when there are no grounds. Accordingly, I dismissed the application.

I Before us, En Malik Imtiaz submitted that the application to the judge to recuse himself was based on an 'apprehension of bias' (as opposed to actual bias). According to a press statement issued by the respondent on 11 April 2001, the appellants were detained for, inter alia, their involvement in

efforts to organize demonstrations aimed at using militant means. Amongst the more significant and imminent demonstrations was (at that time) one referred to as 'Black 14' which was to have taken place on 14 April 2001. 'Black 14' is the expression used to refer to and commemorate the date of the delivery of the judgment in *PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1 by the learned judge, and the said judgment had been the subject matter of great criticism. In the premises, counsel contended that there was a reasonable apprehension on the part of a fair minded person that the said judge might not bring an impartial mind to decide the case, and as such, justice would not be seen to be done. He stated that the court must act impartially and must also be seen to act impartially (*Ebner v Official Trustee in Bankruptcy* (2000) HCA 63). In any event, there was a real danger of apparent bias.

En Malik Imtiaz relied on the decision of the High Court of Australia in *Webb v The Queen* (1994) 68 ALJR 582, where a juror in a murder trial brought flowers to court and, on impulse, asked a bystander to give them to the murdered person's mother who was present in court. Counsel for the persons accused thereupon asked for a 'mistrial' but the trial judge, having identified the juror who apologized for being impulsive, ruled that the trial should proceed after giving the jury a specific direction to disregard all emotional inclinations and to assess the evidence objectively. The decision of the trial judge was affirmed on appeal; a further appeal was taken to the High Court. By a majority decision, the court held that the appropriate test in Australia is whether the act of the juror gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror will not discharge his task impartially. This is known as the 'alleged bias' test. The majority decision had clearly rejected the English 'real danger' test where the court said that since the last 18 years, it had consistently adhered to the reasonable apprehension test and there is strong reason why they should continue to prefer the reasoning in their own cases to that of the House of Lords (p 585). It is of interest to note that the New Zealand courts also applied the reasonable suspicion test, see *R v Papadopoulos (No 2)* (1979) 1 NZLR 629 (CA).

In England, the courts applied the 'real danger' of bias test in a criminal case. In *R v Gough* [1993] AC 646, the House of Lords rejected the reasonable suspicion test. Lord Goff, after examining the authorities in detail, reformulated the real danger test as follows (at p 670):

> [Having] ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was *a real danger of bias* on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration. (Emphasis added.)

His Lordship also made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors (like *Webb*) or with arbitrators.

In *Re Pinnochet (No 2)* [1999] 1 All ER 577, the House of Lords considered *R v Gough*. In the course of his judgment, the presiding judge,

Lord Browne Wilkinson, referred to the conflict of judicial opinion as to the correct test to apply when apparent bias is alleged and left open the question whether the test in *R v Gough* needs to be reviewed.

In *Locabail Ltd v Bayfield Properties* [2000] 1 All ER 65, the English Court of Appeal applied the *Gough* test and stated that the court must ask itself whether '... in the circumstances of the case... it appears that there was a real likelihood, in the sense of a real possibility, of bias...'. It further held that in answering this question, the court must take into account the actual facts as disclosed by the evidence and, in particular, what it was that the judge knew at the time the case was being heard.

In Malaysia, this court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 followed the 'real danger of bias' test in *Gough* as 'this will avoid setting aside of judgment upon quite insubstantial grounds and the flimsiest pretexts of bias' (p 70). See also *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305.

Having considered the authorities cited and their reasonings, we would follow *Gough* which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was there a real danger of bias on the part of the learned trial judge when he heard the habeas corpus application involving the appellants?

In our view, on the facts submitted by counsel and the reasons given by the learned trial judge in the grounds of judgment (at p 601 appeal record), there is no real likelihood of danger, in the sense of a real possibility, of bias on the part of the learned judge when he heard the habeas corpus application. We concede that the only common factor between the appellants and the 'Black 14' judgment of the learned judge is that the appellants were detained by the respondent for organizing demonstrations, one of which was on 14 April 2001 which became the foundation for the 'Black 14' allegation of the respondent. However, we do not think such circumstances give rise to a real danger of bias on the part of the learned judge. Even if we apply the reasonable apprehension of bias test to the circumstances of this case, we would arrive at the same conclusion.

In the result, we would dismiss this ground of appeal. It follows therefore the issue as to whether the matter should be remitted to the High Court for rehearing or be dealt with by the court does not arise.

Appeal dismissed.

Reported by Peter Ling